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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 870.

STATE OF MISSOURI ex inf. JOHN M. DALTON, Attorney General, ex rel. RICHARD E. HOLEKAMP, et al.,
Appellants,

vs.

HOLEKAMP LUMBER CO., a Corporation, et al.,
Appellees.

On Appeal from the Supreme Court of the State of Missouri.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

DONALD E. FAHEY,
1810 Boatmen's Bank Building,
314 North Broadway,
St. Louis 2, Missouri,
Attorney for Appellants.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street, CEntral 1-4477

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Appellants respectfully urge the Court to overrule Appellees' Motion to Dismiss this appeal which motion is based on the alleged ground that the appeal does not present a substantial Federal question.

ARGUMENT.

Appellants believe that their Statement of the question presented, their Statement of the case and presentation of the Federal question in the Jurisdictional Statement herein filed fairly presented the question before the Court. Rule 10 of this Court's rules requires brevity and provides that the Statement and Question, as well as the formal Notice of appeal, are deemed to include every subsidiary question fairly comprised therein. The Jurisdictional Statement contains in full the exact position of the Missouri Supreme Court as to the nature, extent and scope of the so-called "reserved power" over corporation charters. This reserved power in the Legislature to change and to authorize stockholders to change the corporate charter retroactively which the Missouri Court here held to have existed was not written out in the 1875 Missouri Constitution. The reservation therefore cannot be quoted. This case is the first opinion of the Missouri Court which revealed the existence of the power (Jurisdictional Statement pages 23 and 24).

The opinion of the Court which found the reservation also quite clearly defined its limitations. The "reservation" was defined as limited by the Federal Constitutional limitations of "police power, due process and obligations of contracts" (Jurisdictional Statement pages 24 and 26). Appellants' statement of the question asked whether the Federal Constitution authorized the acts of the majority stockholders here complained of, because the "reserved power" which sanctioned the statutes which enabled appellees to act, in the words of the Missouri Court, sanctioned such legislation only if such actions thereunder are within the three Federal Constitutional limitations above mentioned. Appellees' attempted restatement of the question assumes a defined uncircumscribed reservation of

power, which is the usual case. Likewise, the attempted restatement of Appellants' case fails to fully quote the opinion of the Missouri Court in that the statement on page 3 of the brief leaves out the very heart of this matter, namely, the limitations on the reserved power.

Appellees' argument rests mainly upon a sentence in this Court's opinion in **Phillips Petroleum Co. v. Jenkins**, 297 U. S. 629, 634, 56 S. Ct. 611, 613, 80 L. Ed. 943, 947-948 (1936). This Court said, "The reservation of power to amend is a part of the contract between the State and the corporation and therefore Section 10 of Article 1 of the Federal Constitution does not apply." Appellants submit that this Court there meant that the written and uncircumscribed legislative reservation of the Arkansas Statutes involved in that case did not apply and further that the words "does not apply" referred to the Phillips Case and any similar case. The next sentence of the opinion clearly refutes Appellees unlimited application of the quoted sentence for Mr. Justice Butler went on to spell out that the reserve power is not unlimited but must function within the scope of all Federal Constitutional provisions—referring to this Court's prior opinion in **Looker v. Maynard ex rel. Dusenbury**, 179 U. S. 46, 21 S. Ct. 21, 45 L. Ed. 79 (1900). The Phillips Petroleum Company decision pointed out early in the opinion that the sole question before the Court is whether the Arkansas Statute involved denies to the Appellant foreign corporation the equal protection of the Arkansas laws in violation of the Fourteenth Amendment. The question raised in the present appeal was not raised in the Phillips Petroleum Company appeal, and hence, was not there answered. Appellants submit that the Phillips' decision was not intended to overrule, nor has it been accepted as overruling, in any sense this Court's opinion in **Looker v. Maynard et al.**, supra, or this Court's opinion in **Coombers v. Getz**, 285

U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866 (1932). Appellees use of the Phillips case, however, would so do. As stated above, the opinion of **Looker v. Maynard et al.** (supra) placed constitutional limitations on the use by a State Legislature of a reserved power over corporate contracts. The Looker case did not foreclose the applicability of Article 1, Section 10 of the Federal Constitution to all or any other type of reserved power. This Court's opinion in **Coomber v. Getz** (supra) again did not foreclose consideration under Article 1, Section 10 of the effect of corporation amendments made under a "reserved power" for the decision clearly rests on such grounds as to "third" parties. The dissenting opinion of Mr. Justice Cardozo repeated the phrase "The claim of an irrepealable contract cannot be predicated upon a contract which is repealable." This statement cannot be of help to Appellees here for the Missouri Court has held that the reserved power (repealable part of the contract) is irrepealable if a vested right or contract obligation is involved. The limitation of the Missouri reserved power defined by the Missouri Court gives substance to this appeal. As this Court stated in **Coombers v. Getz** (supra), as in many of its other opinions on this point, when the contract clause of the Federal Constitution is involved this Court for itself must determine the contract, the obligations arising thereunder, their possible impairment and the meaning and application of the State provision creating the contract or impairing its obligations. The Appellees' argument plays with words not substance. The argument in support of the motion seems to say: "The Federal Supreme Court holds that if there is a 'reserved power' there can be no impairment of contract obligation under the Federal Constitution. The Missouri Supreme Court holds that the Missouri reserved power cannot be used to impair a contract obligation under the Federal Constitution. The Missouri Supreme Court then holds that the law and actions here complained of are not

in violation of the Federal Constitution. Thus the Missouri Supreme Court is left as the final and only arbiter of a substantial Federal Constitutional question." This result is contrary to all decisions of this Court on the subject. The fallacy occurs because Appellees ignore the limited scope of the Missouri reserved power.

This Court's opinion in the case of **Stockholders of the Peoples Banking Company v. Sterling**, 300 U. S. 175, 57 S. Ct. 386, 81 L. Ed. 586 (1937) held that the amended legislation there involved did not violate a prior contract right; more properly a contract liability, of the stockholders to the corporation. The Court specifically held that this was true because the Appellants there could not show themselves harmed though the operation of the Statute they challenged as unlawful, and further because the appellant shareholders could show only that their relation to the corporation was altered. The appellants in the case at bar now before the court can show that they have been substantially harmed by the legislation challenged as unlawful. The right to determine the length of time that their investment shall be under the control of others was taken away from twenty-five percent of the shareholders of the Holekamp Lumber Company. These shareholders contract right was not diluted, it was abolished. Further this is a contract right which existed between the shareholders inter se, as distinguished from a contract right which existed between the shareholders and the corporation. This latter point raised in the **Trustees of Dartmouth College v. Woodward** opinions, 4 Wheat. 518, 4 L. Ed. 629 (1819) Appellants submit has not since been passed upon by this Court. This Court's opinion in **Harry M. Viex v. Sixth Ward Building and Loan Association**, 310 U. S. 32, 40, 60 S. Ct. 794, 84 L. Ed. 1061, 1066 (1940), which sanctioned the corporate contract amendment on the ground of the exercise of the State's police power, said in making

an analogous comparison, that the reserved power may be the grounds upon which the relations between the shareholders and the corporation may be varied without impairing the obligations of contract existing between the shareholders and the corporation. The Court did not go so far as to say that contract obligations existing between the shareholders inter se, as here involved, could be so voided under a reserved power theory. Appellants urge the Court to consider the distinct relationships inherent in the basic corporate contract—relation between the State and the Corporation—relation between the Stockholders and the Corporation—and the relationship between the Stockholders inter se. Violence to individual fundamental rights and duties existing between stockholders inter se, can and does often occur in majority control of corporations under modern corporation practice.

Appellees have construed this Court's prior opinions to hold that such distinct relationship does not exist and if it does, consideration of any change in that relationship cannot be considered by this Court in any case involving a "reserved power" provision. The proper determination of such a question is both Federal and substantial. As Appellees admit in their brief this question has heretofore not been passed upon by this Court and as they seem to admit on page 8 the question is of great importance to Missouri Corporation shareholders.

Appellants take specific exception to a point raised on page 9 of Appellees' brief under Point II of their argument, namely, the argument that the right to extend the duration of this Corporation by simple majority vote existed from the beginning of the Corporation. This argument is contrary to the Missouri Supreme Court's opinion (Jurisdictional Statement pages 20 and 21 and pages 26 and 27).

CONCLUSION.

Appellants urge the Court to overrule Appellees' Motion to Dismiss. Appellants urge the Court to hear and determine this appeal as it presents for this Court's determination Substantial Federal Questions which have not heretobefore been before this Court and which the Court alone should finally determine.

Respectfully submitted,

DONALD E. FAHEY,
1810 Boatmen's Bank Building,
314 North Broadway,
St. Louis 2, Missouri,
Counsel for Appellants.